ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, DC 20554

In the Matter of	)	
	)	
ARCH COMMUNICATIONS GROUP, INC. AND	)	WT Docket No. 99-365
PAGING NETWORK, INC.	)	File Nos. 0000053846, *et al.*
	)	DA 99-3028
Application For Consent to Transfer of Control of	)	
Paging, Narrowband PCS, and Other Licenses	)	

OPPOSITION TO PETITION FOR RECONSIDERATION OR INFORMAL COMPLAINT

Kathryn A. Zachem
Lawrence J. Movshin
Carolyn W. Groves

Attorneys to Arch Communications Group, Inc.

Wilkinson Barker Knauer, LLP
2300 N Street, N.W., Suite 700
Washington, D.C. 20037
(202) 783-4141

September 22, 2000

TABLE OF CONTENTS

ORIGINAL

BEFORE THE
Federal Communications Commission
WASHINGTON, DC 20554

In the Matter of	)	
	)	
ARCH COMMUNICATIONS GROUP, INC. AND	)	WT Docket No. 99-365
PAGING NETWORK, INC.	)	File Nos. 0000053846, *et al.*
	)	DA 99-3028
Application For Consent to Transfer of Control of	)	
Paging, Narrowband PCS, and Other Licenses	)	

OPPOSITION TO PETITION FOR RECONSIDERATION OR INFORMAL COMPLAINT

Arch Communications Group, Inc. ("Arch"), by its attorneys, hereby opposes the Petition for Reconsideration or Informal Complaint filed September 12, 2000 in the above-captioned proceeding by Metrocall, Inc. (hereinafter the "Petition")[1] and urges its prompt, summary dismissal.

INTRODUCTION/SUMMARY

Metrocall purports to seek reconsideration of the Commission's April 25, 2000 order ("*Order*") granting applications for transfer of control ("transfer applications") in connection with the proposed merger (the "Merger") of Arch and Paging Network, Inc. ("PageNet").[2]

---

1 On September 18, 2000, Metrocall filed a "Supplement to Petition for Reconsideration or Informal Complaint" ("Supplement"). Since the Supplement, which is no less untimely than the original Petition, adds no substantive matters to the initial filing, Arch's response is consolidated herein.

2 *Arch Communications Group, Inc. and Paging Network, Inc. For Consent to Transfer Control of Paging, Narrowband PCS, and Other Licenses*, Memorandum Opinion and Order, DA 00-925 (rel. Apr. 25, 2000). As discussed herein, PageNet has filed a plan of reorganization pursuant to Chapter 11 of the U.S. Bankruptcy Code seeking to implement the Merger. *In re Paging Network, Inc., et al.*, Case No. 00-03098 (Bankr. DE).

Metrocall asserts that the First Amended Joint Plan of Reorganization filed by PageNet reveals an unlawful transfer of control to Arch's lenders of certain Commission licenses.[3]

As demonstrated below, the Petition is utterly without merit, frivolous and should be summarily dismissed. The Petition urges the Commission to rescind its grant of the transfer applications and return the applications to pending status. The Petition, therefore, is an improper collateral attack against the *Order* which is final and no longer subject to review. As explained herein, the Petition is clearly time-barred by Sections 402 and 405 of the Communications Act of 1934, as amended (the "Act"), and the Commission's rules promulgated thereunder, has no basis in law or fact, and is nothing more than a transparent attempt to interfere with the pending PageNet bankruptcy proceeding. Even recasting this filing as an "informal complaint" cannot remedy the flaws of the Petition. The relief sought by Metrocall *cannot* be provided nearly four months after the *Order* granting the Arch/PageNet transfer applications became final. Arch has all necessary Commission approvals to close this transaction and intends to do so promptly once the U.S. District Court for the District of Delaware, sitting as a bankruptcy court adjudicating the PageNet bankruptcy case (the "Bankruptcy Court"), confirms the PageNet plan of reorganization (currently scheduled to be heard on October 26, 2000).

I. THE PETITION IS TIME BARRED BY STATUTE AND MUST BE SUMMARILY DISMISSED

Section 405(a) of the Act fixes a 30-day deadline for aggrieved parties to seek Commission reconsideration of an "order, decision, report or action [that] has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant

---

[3] *See* Metrocall Petition, Summary.

to [delegated authority] . . . ."[4] Petitions for reconsideration filed outside this 30-day window are time-barred and must be dismissed.[5] Section 402(b), (c) of the Act authorizes aggrieved parties in Commission licensing proceedings to seek judicial review of an order or action by the Commission within 30-days of public notice of that action.[6] Once the time for seeking review has passed, if parties did not timely seek reconsideration or judicial review, the Commission's jurisdiction over the case comes to an end, and not even Congress may set aside the Commission's final judgment.[7]

Arch and PageNet's transfer applications to effectuate the proposed Arch/PageNet merger[8] were granted April 25, 2000 by the Wireless Telecommunications Bureau under delegated authority. Neither Metrocall *nor any other party* sought reconsideration by the Bureau, applied for review by the full Commission, or sought judicial review within the relevant

---

4 47 U.S.C. § 405(a). Metrocall acknowledges that this statutory provision is the basis for the filing of its Petition.

5 *Id. See, e.g., Washington Broadcast Management Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 6607 (2000) (petition for reconsideration filed eight days late summarily dismissed); *Stephen E. Powell*, Memorandum Opinion and Order, 11 FCC Rcd 11925 (1996) (petition for reconsideration filed three weeks late summarily dismissed); *PDB Corporation, State College*, Memorandum Opinion and Order, 11 FCC Rcd 6198 (1996) (petition for reconsideration filed three weeks late summarily dismissed); *Robert J. Maccini, Receiver, and Aritaur Communications, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 9376 (1996) (petition for reconsideration filed six days late summarily dismissed).

6 47 U.S.C. § 402(b), (c).

7 *Plaut v. Spendthrift Farm, Inc.*, 115 S.Ct. 1447, 1457 (1995).

8 As disclosed in their transfer applications, Arch and PageNet executed an Agreement and Plan of Merger on November 7, 1999 ("Merger Agreement"). Although this Agreement has been amended several times (January 7, May 10, July 24 and September 7, 2000), there has been no material change in the post-merger ownership information previously reported to the FCC in the Arch/PageNet transfer applications.

statutory deadlines.[9] Consequently, the Commission's approval of the merger of Arch and PageNet became final on June 5, 2000.[10] Metrocall's Petition for Reconsideration, filed September 12, 2000, over three months past all applicable appeal deadlines, is patently time-barred and must be dismissed.

Metrocall attempts to explain away its gross tardiness, arguing that *Meredith Corporation v. FCC* holds that "'section 405 has never been construed to be an absolute bar on reconsideration of issues raised after thirty days.'"[11] Metrocall's reliance on *Meredith* is in error. In *Meredith*, the Court of Appeals affirmed a Commission decision to allow a party to *supplement* a petition for reconsideration after the 30-day filing deadline had passed. The critical fact in *Meredith*, which Metrocall ignored, was that a petition for reconsideration *had* been timely filed,

---

9 Of course, since the grant was taken by the Bureau under delegated authority, a party would have had to seek Commission review of the decision before seeking judicial review. 47 U.S.C. § 155(c)(7); 47 C.F.R. § 1.115(k). *See Committee to Save WEAM v. FCC*, 808 F.2d 113, 115-16 (D.C. Cir. 1986) (dismissing petition where appellant failed to seek full Commission review of FCC staff decision). In this case, *no* reconsideration by the Bureau or review by the full Commission was pursued.

10 *See* 47 C.F.R. §§1.106 (cited by Metrocall as the regulatory basis for its filing) and 1.115 (dealing with petitions for reconsideration or applications for review of actions taken under delegated authority, either of which must be filed within 30 days); 47 C.F.R §1.113 (Bureau may reconsider any action it has taken pursuant to delegated authority within 30 days after public notice of such action is given); and 47 C.F.R. § 1.117 (Commission may order review of any action taken pursuant to delegated authority within 40 days after public notice of such action is given). While even a non-party to a proceeding may attempt to rely on "new facts or circumstances" as the basis for standing to bring a *timely* petition for reconsideration or application for review, the existence of new facts cannot overcome the statutory bar to review of a non-appealable, non-reviewable "final order." *See e.g.*, 47 C.F.R. §§ 1.106 (b)(1), (c). An application for review will not be granted "if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass." 47 C.F.R. § 1.115(c).

11 Metrocall Petition at 4, *quoting Meredith Corporation v. FCC*, 809 F.2d 863, 869 (D.C. Cir. 1987).

thus the case was not final -- the Court found there was no statutory bar to the *supplemental* filing at issue in that case.[12] In this case, however, no timely petitions for reconsideration or applications for judicial review were filed, and the *Order had* become final. Petitions for reconsideration simply cannot lie against a final order.

The need for such a clear demarcation of finality is obvious. The Courts have consistently found that private parties "must be able to rely upon, and make substantial expenditures on the basis of, the finality of Commission action determined through the application of some objective and publicly knowable criteria — which 'public notice,' as defined in the Commission's rules, assuredly is."[13] Metrocall's assertions to the contrary are frivolous, and the Petition must be summarily rejected. Arch has all final Commission approvals necessary to close its merger with PageNet, and it intends to do so this Fall following confirmation of the PageNet plan of reorganization by the Bankruptcy Court.

II. THE INFORMAL COMPLAINT HAS NO MERIT AND SHOULD BE SUMMARILY DISMISSED

Metrocall's attempt to classify its filing as an informal complaint under Section 1.716 of the Commission's Rules does not remedy the document's fatal flaw. The relief Metrocall seeks to obtain establishes that this filing is nothing more than a collateral attack against the *Order.*[14]

---

12 *Meredith*, 809 F.2d at 869. Indeed, this point is underscored by the very case relied upon and quoted by the *Meredith* court. *Id. citing Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 283 (D.C. Cir. 1971) ("So long as the time for appeal to the court has not expired the FCC has jurisdiction to provide reconsideration in its sound discretion.").

13 *National Black Media Coalition v. FCC*, 760 F.2d 1297, 1300 (D.C. Cir. 1985).

14 Specifically, Metrocall requests: (1) rescision of the grant of the transfer of control applications and a return of the applications to pending status; (2) an order directing Arch to amend the applications to reflect an alleged transfer of control resulting from a new

(continued...)

Whether as a petition for reconsideration or an informal complaint, in seeking rescission of the *Order,* the Petition is an improper collateral attack against a final Commission order and must be dismissed.

Moreover, even if the Petition is treated as an informal complaint pursuant to Section 1.716 of the Commission's rules, or an informal request for Commission action under Section 1.41 of the rules, neither Commission action nor a response from Arch is mandated at this time;[15] however, so that silence cannot be misconstrued by Metrocall in any other forum, Arch submits this response to demonstrate the lack of *any* merit to Metrocall's claims.

Metrocall asserts that the Amended Plan "contains new ownership and control proposals that are materially different from those" that the Commission previously approved.[16] Metrocall focuses exclusively on a new term in the Amended Plan which (1) accelerates repayment of $110 million of the nearly $1.3 billion in secured debt for the combined Arch/PageNet credit facility as part of the PageNet plan of reorganization and (2) may require Arch to sell assets, if necessary to meet this obligation.[17] Metrocall characterizes this new term as a "negative covenant" that

---

14 (...continued)
term in the Amended Plan; and (3) a finding that the new term is unlawful and impermissible. Metrocall Petition at 12.

15 Section 1.41 of the rules simply authorizes informal filings - - the rule establishes no procedures and requires no action by Arch or the Commission. 47 C.F.R. § 1.41. As to informal complaints, the Commission merely forwards such complaints to the appropriate carrier for investigation. 47 C.F.R. § 1.717. The carrier investigates the informal complaint, attempts to satisfy it, and notifies the Commission of the success or failure of its efforts. *Id.* If the carrier cannot satisfy the complainant, the Commission will inform the complainant of its right to file a formal complaint. *Id.* The informal complaint rules contemplate no other actions by the carrier or Commission.

16 Metrocall Petition at 5.

17 *Id.* at 6.

constitutes a substantial change in ownership and control over some of the PageNet licenses being acquired in the transaction, which transfer requires prior Commission approval.[18]

Metrocall's filing is grossly without merit and clearly frivolous. Arch hereby confirms that there has been no material change in the ownership structure of the proposed Arch/PageNet merger since the transfer applications were filed with the Commission. With immaterial exceptions typical of any publicly traded stocks and bonds, and a minor adjustment to the distribution of Arch shares between PageNet bondholders and stockholders, the ownership reported at the time the transfer applications were filed is the same as the ownership that will exist when the merger is consummated.

Moreover, Metrocall fails to provide citation to *any* case which supports the proposition that acceptance of an accelerated repayment condition proposed by a lender constitutes a change in ownership or a transfer of control; even the cases Metrocall cites cannot possibly be read to support its claim. As noted in the cited *News International* case,[19] the Commission has long recognized that "a realistic definition of the word 'control' includes any act which vests in a new entity or individual the right to determine the manner or means of operating the licensee and

---

18 *Id.* at 7 ("An actual, substantial transfer of 'negative control' over the SMR or unidentified [Commission] assets, from that which the [Commission] approved . . . may already have occurred, or is, at a minimum, imminent."). In the Supplement, Metrocall goes so far as to suggest that "the lenders apparently have sufficient control over Arch to dictate new payment obligations under an existing credit facility, and exercise 'veto' power over which corporate assets will be sold to satisfy those new obligations." Supplement at 4.

19 *News International, PLC*, Memorandum Opinion and Order, 97 F.C.C.2d 349 (1984).

determining the policy that the licensee will pursue."[20] Control only exists if an investor or lender has the power to dominate the management and/or operations of the licensee.[21]

To that end, the Commission has generally held that negative covenants which protect a lender's investment do not ordinarily represent a "transfer of control" requiring Commission approval.[22] Moreover, even in *News International*, upon which Metrocall relies heavily, the Commission found that the delineated minority shareholders' rights did *not* constitute a transfer of control.[23] In *WWIZ, Inc.*, another case upon which Metrocall relies, the Commission found that investor protection restrictions may lead to a transfer of control *when combined with investor activity in the affairs of a corporation.*[24] Conversely, the Commission has found that the very negative covenants at issue in *WWIZ* do not constitute a transfer where control activity by the minority investor is lacking.[25] In sum, negative covenants of the type Metrocall complains are

---

20 *Id.* at 355, ¶ 16, *citing WHDH, Inc.*, Memorandum Opinion and Order, 17 F.C.C.2d 856, 863 (1969).

21 *See Benjamin L. Dubb*, 16 F.C.C. 274, 289 (1951).

22 *Flathead Valley Broadcasters,* 5 Rad. Reg. 2d (P&F) 74 (Rev. Bd. 1965).

23 *News International*, 97 F.C.C. 2d at 357-58, ¶ 20.

24 *WWIZ, Inc.*, 36 F.C.C. 561 (1964). In *WWIZ*, the Commission found an unauthorized transfer of control when it came to light that (1) the licensee, Mr. Schafitz, had falsely claimed 100% ownership in the company holding the license, and (2) the hidden investor, Journal, had significant control in the day-to-day affairs of the licensee, including: (i) the formula for dispersing dividends from the company disproportionately favors the Journal; (ii) the structure of the company's board of directors gave control to parties representing the Journal's interest by requiring super majority votes for actions such as removing a director, amending the code of regulations or by-laws, or encumbering the company; (iii) the corporation could not draw checks without signatures representing both Mr. Schafitz' and the Journal's interest; and (iv) no money could be borrowed or any contract committing the company to expend in excess of $1,000 without approval of the board. *Id.* at 581.

25 *Data Transmission Co.*, 44 F.C.C. 2d 935 (1974). Metrocall does not, and cannot, argue

(continued...)

unlawful only if the "totality of the circumstances" demonstrates that *de facto* control of the licensee has, in fact, changed.[26] Metrocall does not, and can not, argue that this is the case here.[27]

Stated simply, Arch has agreed to accelerate payment of a small portion of the secured debt it has undertaken to assume in the acquisition of PageNet in response to a proposal initially made by Metrocall in its bid for PageNet. This agreement came out of arms-length negotiations between Arch and PageNet's secured lenders to develop a reorganization plan to bring PageNet out of bankruptcy and facilitate the merger of Arch and PageNet. There is no requirement that Arch sell assets to cover its repayment obligation; Arch is free to use other financing if it is available. If, and when, Arch agrees to transfer control or assign Commission licenses, it will make the appropriate filings. Metrocall's assertion that "Arch, by agreeing to these loan provisions, has evidently abandoned control over the SMR licenses or other unidentified

---

25 (...continued)
that the lenders in this case will undertake any such active involvement.

26 *See generally, Advanced Business Communications, Inc.*, Memorandum Opinion and Order, 100 F.C.C. 2d 525 (1985).

27 Metrocall, after first acknowledging that "it is not uncommon for loan arrangements to grant secured creditors some rights to prevent a debtor from disposing of assets to a degree that would significantly diminish the collateral available to those creditors[,]" suggests, again without citing to any specific contractual provisions, that Arch's lenders have "a highly unusual level of control." Supplement at 4. It is not surprising that Metrocall has acknowledged the ubiquitous nature of these types of covenants; as demonstrated in the attached excerpts (attached hereto as Exhibit 1) from its recently filed "Fifth Amended and Restated Loan Agreement," Metrocall has agreed to substantially similar types of restrictions on Metrocall's sale of assets and the use of the proceeds therefrom, as Arch has agreed to in this case.

[Commission] licenses" is ludicrous.[28] Metrocall's "informal complaint" warrants nothing more than summary rejection.

III. THE INFORMAL COMPLAINT IS INTENDED TO DISRUPT THE ARCH/PAGENET TRANSACTION AND MUST BE CONSIDERED ACCORDINGLY

That the Petition and the Supplement have no merit is beyond dispute. The Commission can better appreciate the frivolous nature of the Petition, even as an informal objection, if it is also cognizant of Metrocall's contemporaneous efforts in the ongoing PageNet bankruptcy proceeding to disrupt the consummation of the Arch/PageNet transaction.

On July 14, 2000, an involuntary bankruptcy petition was filed against PageNet with the Bankruptcy Court. On July 24, 2000 (and as anticipated as a possible course of action in the Arch/PageNet transfer applications), PageNet consented to the involuntary petition, thereby commencing its Chapter 11 case, and on the same day filed voluntary Chapter 11 petitions for its domestic operating subsidiaries. Also on the same day, PageNet filed with the Bankruptcy Court its proposed plan providing for implementation of the Arch/PageNet transaction and an accompanying disclosure statement.

Shortly after the PageNet Chapter 11 case commenced, Metrocall filed a motion with the Bankruptcy Court requesting, among other things, that it be allowed to file a plan of reorganization providing for Metrocall's acquisition of PageNet, that PageNet be required to provide Metrocall with due diligence and that the Arch/PageNet transaction be delayed in order

---

[28] Metrocall Petition at 9. Indeed, if Metrocall were correct, and this simple repayment agreement is a transfer of control, then any contracts involving the sale of Commission licenses would constitute an unlawful transfer, precluding licensees from selling their assets.

to allow Metrocall's proposal to be included in a competing plan of reorganization that would be submitted to PageNet's creditors.

According to the transcript from a September 7, 2000 hearing before the Bankruptcy Court,[29] a representative of the Official Committee of Unsecured Creditors (the "Committee") made clear that the Committee had officially voted on September 5, 2000 to support the Arch deal: "[T]he Arch deal was in fact the preferable deal. . . . [I]t is important . . . to inform the [Bankruptcy] Court how much the [C]ommittee is committed to the Arch deal and to moving this process to its fastest possible completion . . ."[30] The Committee's representative also stated that "[t]he long and short of it is, Your Honor, the people who really hold claims in this case as opposed to Metrocall . . . have listened to Metrocall's offer, and we thank them for their effort, but we find it wanting.[31] We have asked them, basically, to go seek to buy another asset, and we urge this Court not to grant them any relief . . . that could conceivably delay this case."[32]

---

29 Select portions are attached hereto as Exhibit 2.

30 Hearing Transcript, Paging Network, Inc., *et al.*, Case No. 00-03098, at 32-33 (GMS) (Sept. 7, 2000) (hereinafter "Transcript").

31 Interestingly, Metrocall also proposed to the Committee that a $175 million dollar shortfall in their proposal "was to come from the sale of various SM [sic] licenses and related property now held by one of these debtors, Paging Network of America to Nextel, Inc." Transcript at 30. In response to a proposal initially made by Metrocall in bidding for PageNet, PageNet's secured lenders renegotiated the PageNet plan of reorganization with Arch and PageNet. As Metrocall noted, after several rounds of negotiations, the reorganization plan has been revised to accelerate payment of a portion of PageNet's debt to accommodate the secured lenders' requirements and now provides for the possible sale of assets, "which may include excess spectrum . . . subject to regulatory approval and any sale of other assets may also require regulatory approval and the consent of other third parties."

32 Transcript at 33-34. In addition, one of PageNet's creditors, Motorola, stated "It is a little awkward for us because Metrocall is an important client of Motorola. But we think this case needs to move forward . . . the Court should simply dismiss at this time, and if there

(continued...)

Counsel to PageNet's secured lenders agreed with the Committee's position stating that the "banks stand in support of the Creditor's Committee and in opposition to the relief sought by Metrocall today, and respectfully request this Court keep this case on track to successful consummation of the Arch transaction."[33]

In a competitive market, there can be little doubt that allowing a significant, but wounded, competitor to falter can have substantial benefits. With no merit to any of its arguments, Metrocall's filing of the Petition can only be viewed as a desperate attempt to use the Commission's processes, even its informal ones, to throw even a shred of uncertainty onto the Arch/PageNet merger and buy more time to drum up support for its efforts to acquire PageNet or, more unseemly, to cause PageNet's financial situation to further deteriorate, making it a less viable competitor.

---

32 (...continued)
is some new cause they are alleging, consider it at that time." *Id.* at 39.

33 *Id.* at 38. At the close of the hearing, the Bankruptcy Court set a deadline of September 18, 2000 for Metrocall to file a new motion seeking to terminate PageNet's exclusive right to file its plan of reorganization if Metrocall obtained financing for its alternative plan. Metrocall did, in fact, renew its request to terminate PageNet's exclusivity period and cited, as one of the primary reasons why the Bankruptcy Court should allow Metrocall to file a plan of reorganization, the pendency of its Petition and related Supplement before the Commission. Metrocall has been unsuccessful in obtaining any PageNet creditor support for its proposal and has been unsuccessful in obtaining delay in the approval process from the Bankruptcy Court.

CONCLUSION

For the foregoing reasons, Arch respectfully requests that the Commission dismiss summarily Metrocall's alleged "Petition for Reconsideration Or Informal Complaint" and related Supplement.

Respectfully submitted,

ARCH COMMUNICATIONS GROUP, INC.

By: _____
Kathryn A. Zachem
Lawrence J. Movshin
Carolyn W. Groves

Wilkinson Barker Knauer, LLP
2300 N Street, N.W., Suite 700
Washington, D.C. 20037
(202) 783-4141

Its Attorneys

Date: September 22, 2000

Exhibit 1

Page 1 -- 10-Q -- EX-10.1 -- Filed by METROCALL INC

1

EXHIBIT 10.1
EXECUTION COPY
3/17/00

FIFTH

AMENDED AND RESTATED LOAN AGREEMENT

among

METROCALL, INC.,

the "Borrower";

The Financial Institutions Signatory Hereto;

TORONTO DOMINION (TEXAS), INC., as "Administrative Agent" for the Lenders

dated as of March 17, 2000

with

BANK OF AMERICA, N.A. (f/k/a NationsBank, N.A.), as "Documentation Agent";

FIRST UNION NATIONAL BANK, as "Co-Documentation Agent";

and

THE TORONTO-DOMINION BANK, as Issuing Bank;

TD SECURITIES (USA) INC. and FIRST UNION SECURITIES, INC.,

as "Co-Lead Arrangers" and "Co-Book Managers"

and

FLEETBOSTON ROBERTSON STEPHENS INC., as "Syndication Agent"

Page 2 -- 10-Q -- EX-10.1 -- Filed by METROCALL INC

2

INDEX

VIEW THIS TABLE IN EXCEL

VIEW THIS TABLE IN EXCEL

EXHIBITS

SCHEDULES

FIFTH AMENDED AND RESTATED LOAN AGREEMENT

THIS FIFTH AMENDED AND RESTATED LOAN AGREEMENT made as of the 17th day of March, 2000, by and among METROCALL, INC., a Delaware corporation (the "Borrower"), the financial institutions party hereto as Lenders (together with any financial institution which subsequently becomes a Lender hereunder the "Lenders"), BANK OF AMERICA, N.A. (f/k/a NationsBank, N.A.), as Documentation Agent (the "Documentation Agent"), FIRST UNION NATIONAL BANK, as Co-Documentation Agent (the "Co-Documentation Agent") and TORONTO DOMINION

(TEXAS), INC., as Administrative Agent for the Lenders (the "Administrative Agent").

W I T N E S S E T H:

WHEREAS, the Borrower, the Administrative Agent and certain of the Lenders are all parties to that certain Fourth Amended and Restated Loan Agreement dated as of December 22, 1998 (the "Prior Loan Agreement"); and

WHEREAS, the Borrower has requested that the Administrative Agent and the Lenders consent to certain amendments to the Prior Loan Agreement, as more fully set forth in this Fifth Amended and Restated Loan Agreement; and

WHEREAS, the Administrative Agent and the Lenders have agreed to amend and restate the Prior Loan Agreement in its entirety as set forth herein; and

WHEREAS, the Borrower acknowledges and agrees that the Security Interest (as defined in the Prior Loan Agreement) granted to the Administrative Agent, for itself and on behalf of the Lenders pursuant to the Prior Loan Agreement and the Loan Documents (as defined in the Prior Loan Agreement) executed in connection therewith shall remain outstanding and in full force and effect in accordance with the Prior Loan Agreement and shall continue to secure the Obligations (as defined herein); and

WHEREAS, the Borrower acknowledges and agrees that (i) the Obligations (as defined herein) represent, among other things, the amendment, restatement, renewal, extension, consolidation and modification of the Obligations (as defined in the Prior Loan Agreement) arising in connection with the Prior Loan Agreement and the other Loan Documents (as defined in the Prior Loan Agreement) executed in connection therewith; (ii) the parties hereto intend that the Prior Loan Agreement and the other Loan Documents (as defined in the Prior Loan Agreement) executed in connection therewith and the collateral pledged thereunder shall secure, without interruption or impairment of any kind, all existing Indebtedness under the Prior Loan Agreement and the other Loan Documents (as defined in the Prior Loan Agreement) executed in connection therewith as so amended, restated, restructured, renewed, extended, consolidated and modified hereunder, together with all other Obligations hereunder; (iii) all Liens evidenced by the Prior Loan Agreement and the other Loan Documents (as defined in the Prior Loan Agreement) executed in connection therewith are hereby ratified, confirmed and continued; and (iv) the Loan Documents (as defined herein) are intended to restructure, restate, renew, extend,

consolidate, amend and modify the Prior Loan Agreement and the other Loan Documents (as defined in the Prior Loan Agreement) executed in connection therewith; and

WHEREAS, the parties hereto intend that (i) the provisions of the Prior Loan Agreement and the other Loan Documents (as defined in the Prior Loan Agreement) executed in connection therewith, to the extent restructured, restated, renewed, extended, consolidated, amended and modified hereby, are hereby superseded and replaced by the provisions hereof and of the Loan Documents (as defined herein): and (ii) the Notes (as hereinafter defined) amend, renew, extend, modify, replace, are substituted for and supersede in their entirety, but do not extinguish the indebtedness arising under, the promissory notes issued pursuant to the Prior Loan Agreement;

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by each of the parties hereto, the parties hereby amend and restate the Prior Loan Agreement as follows:

ARTICLE 1

Definitions

For the purposes of this Agreement:

"A+ Indenture" shall mean that certain Indenture dated as of October 24, 1995, as modified by First Supplemental Indenture dated as of November 14, 1996, and Second Supplemental Indenture dated as of November 15, 1996, between the Borrower (as successor to A+ Communications, Inc.) and IBJ Schroder Bank & Trust Company, with respect to the 11-7/8% Senior Subordinated Notes Due 2005 of the Borrower (as successor to A+ Network, Inc.).

"Acquisition" shall mean (whether by purchase, lease, exchange, issuance of stock or other equity or debt securities, merger, reorganization or any other method) (i) any acquisition by the Borrower or any of its Restricted Subsidiaries of any other Person, which Person shall then become consolidated with the Borrower or any such Restricted Subsidiary in accordance with GAAP, or (ii) any acquisition by the Borrower or any of its Restricted Subsidiaries of all or any substantial part of the assets of any other Person.

"Administrative Agent" shall mean Toronto Dominion (Texas), Inc., in its capacity as Administrative Agent for the Lenders or any successor Administrative Agent appointed pursuant to Section 9.13 of this Agreement.

"Administrative Agent's Office" shall mean the office of the Administrative Agent located at 909 Fannin, Suite 900, Houston, Texas 77010, or such other office as may be designated pursuant to the provisions of Section 11.1 of this Agreement.

Section 2.7 Prepayments and Repayments.

(a) Prepayment. The principal amount of any Base Rate Advance may be prepaid in full or ratably in part at any time, without penalty and without regard to the Payment Date for such Advance. Eurodollar Advances may be prepaid prior to the applicable Payment Date, upon three (3) Business Days' prior written notice to the Administrative Agent, provided that the Borrower shall reimburse the Lenders and the Administrative Agent, on the earlier of demand by the applicable Lender or the Maturity Date, for any loss or out-of-pocket expense incurred by any Lender or the Administrative Agent in connection with such prepayment, as set forth in Section 2.10 hereof. Any prepayment hereunder shall be in amounts of not less than $1,000,000 and in integral multiples thereof. Amounts prepaid pursuant to this Section may be reborrowed, subject to the terms and conditions hereof. Prepayments of Advances under the Facility B Commitment shall be applied to amounts outstanding thereunder in inverse order of maturity. Amounts prepaid under the Facility A Commitment pursuant to this Section may be reborrowed, subject to the terms and conditions hereof.

(b) Repayments.

(i) Loans and Letter of Credit Obligations in Excess of Commitments. If, at any time, the amount of (A) the Loans then outstanding under any Commitment shall exceed the applicable Commitment or (B) the aggregate amount of the Facility A Loans and the Letter of Credit Obligations exceeds the Facility A Commitment, the Borrower shall, on such date and subject to Section 2.10 hereof, make a repayment of the principal amount of the Loans or, if there are no such Loans outstanding, establish, if applicable, a Letter of Credit Reserve Account, in each case, in an amount equal to such excess, together with any accrued interest and fees with respect thereto.

(ii) Scheduled Repayments under Facility B Commitment. Commencing March 31, 2002, the principal balance then outstanding under the Facility B Commitment shall be amortized in quarterly installments equal to the percentage of the principal balance outstanding under the Facility B Commitment on March 30, 2002 on the dates set forth below:

[redacted]

Repayment Dates	Percentage
March 31, 2002, June 30, 2002, September 30, 2002 and December 31, 2002	6.250%
March 31, 2003, June 30, 2003,	

September 30, 2003 and December 31, 2003	6.250%
March 31, 2004, June 30, 2004, September 30, 2004 and December 31, 2004	6.250%
March 31, 2005	6.250%
Maturity Date	18.750%

(iii) Equity Proceeds. The Borrower shall repay Loans outstanding under the Facility B Commitment and permanently reduce the Facility A Commitment, with 50% of the Net Available Capital Proceeds of any equity issued by the Borrower on or after the Agreement Date; provided, however, so long as the Borrower provides to the Administrative Agent and the Lenders calculations, in form and substance satisfactory to the Administrative Agent, specifically demonstrating (1) the Borrower's compliance with Sections 7.8, 7.9, 7.10, 7.11 and 7.12, in form and substance satisfactory to the Administrative Agent, both before and after giving effect thereto and (2) that the Total Leverage Ratio is less than or equal to 4.50:1.00, both before and after giving effect thereto, then none of such Net Available Capital Proceeds shall be required to be applied as set forth above; provided further, however, that none of the Net Available Capital Proceeds generated from the Common Stock Investment or the exercise of the HMTF Option by HMTF I shall be required to be applied as set forth herein. All such proceeds shall be applied pro rata between the Commitments. Repayments of Loans under the Facility B Commitment shall be applied to the repayment schedule set forth in Section 2.7(b)(ii) in inverse order of maturity. Reductions to the Facility A Commitment shall be applied as set forth in Section 2.5 hereof.

(iv) Asset Sale Proceeds. The Borrower shall repay the Loans outstanding under the Facility B Commitment and permanently reduce the Facility A Commitment as set forth in Section 7.4(a) hereof, with the Available Net Proceeds from any Asset Disposition not reinvested in accordance with Section 7.4(a). All such proceeds shall be applied pro rata between the Commitments. Repayments of Loans under the Facility B Commitment shall be applied to the repayment schedule set forth in Section 2.7(b)(ii) in inverse order of maturity. Reductions to the Facility A Commitment shall be applied as set forth in Section 2.5 hereof.

Section 7.4 Liquidation, Merger, or Disposition of Assets.

(a) Disposition of Assets. The Borrower shall not, and shall not permit any Restricted Subsidiary to, make any Asset Disposition in one or more transactions involving Net Available Asset Proceeds of $10,000,000 or more, individually or in the aggregate with all other Asset Dispositions, during each fiscal year of the Borrower, without the prior written consent of the Majority Lenders. Further, the Borrower shall not make, and shall not permit any Restricted Subsidiary to make, any Asset Disposition in one or more transactions, unless: (i) the Borrower (or such Subsidiary, as the case may be) receives consideration at the time of such Asset Disposition at least equal to the fair market value of the assets sold or disposed of as determined by the Board of Directors of the Borrower; (ii) at least 80% of the consideration for such Asset Disposition consists of cash or Cash Equivalents or the assumption of Indebtedness for Money Borrowed of the Borrower to the extent that the Borrower is released from all liability on such Indebtedness for Money Borrowed; and (iii) all Net Available Asset Proceeds of such Asset Disposition, less any amounts invested within 180 days of such Asset Disposition in assets related to the business of the Borrower (or invested within one year of such Asset Disposition in assets related to the business of the Borrower, pursuant to an agreement to make such investment entered into within 180 days of such Asset Disposition), are applied within such 180- (or 360-) day period to repay Loans then outstanding.

If, within 180 days after an Asset Disposition, the Borrower or a Restricted Subsidiary enters into a contract providing for the investment of Net Available Asset Proceeds in assets relating to the business of the Borrower and such contract is terminated without fault on the part of the Borrower or such Subsidiary prior to the making of such investment, the Borrower or such Subsidiary, as the case may be, shall within 90 days after the termination of such agreement, or within 180 days after such Asset Disposition, whichever is later, invest or otherwise apply the funds that were to be invested pursuant to such agreement in accordance with the preceding paragraph, and any funds so invested or applied shall for all purposes hereof be deemed to have been so invested or applied within the 180- (or 360-) day period provided for in such paragraph.

(b) Liquidation or Merger. The Borrower shall not, and shall not permit any of the Restricted Subsidiaries to, at any time liquidate or dissolve itself (or suffer any liquidation or dissolution) or otherwise wind up, or enter into any merger, other than (i) a merger or consolidation among the Borrower and one or more of its Restricted Subsidiaries, provided the Borrower is the surviving corporation, or (ii) a merger between or among two or more Restricted

Subsidiaries of the Borrower, or (iii) in connection with an Acquisition permitted hereunder effected by a merger in which the Borrower is the surviving corporation or, in a merger in which the Borrower is not a party, where the surviving corporation is a Restricted Subsidiary.

Section 7.5 Limitation on Guaranties. The Borrower shall not, and shall